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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-595

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, AND BELL TELEPHONE COMPANY OF NEVADA,
Petitioners

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, *Respondent*

CITIZENS UTILITIES COMPANY AND CITIZENS UTILITIES COMPANY OF CALIFORNIA, *Real Parties in Interest*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

FRANCIS R. KIRKHAM
JAMES MICHAEL
NOBLE K. GREGORY
ROBERT M. WESTBERG
MICHAEL H. SALINSKY
225 Bush Street, 19th Floor
San Francisco, California 94104
Attorneys for Petitioner

F. MARK GARLINGHOUSE
195 Broadway
New York, New York 10007
JAMES A. DE BOIS
140 New Montgomery Street
San Francisco, California 94105
PILLSBURY, MADISON & SUTRO
225 Bush Street, 19th Floor
San Francisco, California 94104
Of Counsel

FERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO - CA 94105

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vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, *Respondent*

CITIZENS UTILITIES COMPANY AND CITIZENS UTILITIES COMPANY OF CALIFORNIA, *Real Parties in Interest*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review an order of the United States Court of Appeals for the Ninth Circuit entered in this action on July 10, 1973, denying a writ of mandamus directing the district court to dismiss the action or to at least stay the proceedings

before it pending submission to the Federal Communications Commission.

OPINIONS BELOW

The order of the Court of Appeals is printed in Appendix A. The memoranda decisions of the district court are printed in Appendix B.

JURISDICTION

The order of the Court of Appeals for the Ninth Circuit was filed and entered on July 10, 1973. This Court has jurisdiction pursuant to section 1254(1) of Title 28 of the United States Code.

QUESTIONS PRESENTED

The Federal Communications Commission has pervasive regulatory jurisdiction over all aspects of interstate telephone service. The case at bar involves the division of revenue between telephone companies from interstate interchanged calls, a matter which is specifically placed within the regulatory authority of the Federal Communications Commission. The suit charges a conspiracy between members of the Bell System—American Telephone and Telegraph Company, its ninety percent owned subsidiary, The Pacific Telephone and Telegraph Company, and Pacific's wholly owned subsidiary, Bell Telephone Company of Nevada—to fix, by agreement, the division of revenue. Every decision of this Court and every

other court which has considered the question, establishes that the Federal Communications Commission has exclusive or at least primary jurisdiction in this case. The district court held that the Federal Communications Commission does not even have primary jurisdiction.

Under these circumstances the questions presented are:

1. Does the Federal Communications Commission have primary jurisdiction to determine disputes between federally regulated telephone utilities concerning terms and conditions of interconnection of their communication facilities, particularly the reasonableness of the division of revenues derived from calls interchanged between them?

2. Does the Communications Act of 1934 provide an exemption from the antitrust laws to federally regulated telephone utilities and give to the Federal Communications Commission power to exercise primary or exclusive jurisdiction over disputes as to the reasonableness of agreements providing for division of revenues between utilities whose communication facilities interconnect?

3. Does mandamus lie to prevent inexcusable waste of judicial time in a trial of an antitrust cause before submission of the issues to the Federal Communications Commission?[1]

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[1]The jurisdiction of the state commission—in this case the California Public Utilities Commission—over the intrastate aspects of the controversy was also a basis for the motion to dismiss or to stay the action. In this petition, for purposes of brevity, we are emphasizing the federal regulatory scheme. Each commission has exclusive or at least primary jurisdiction over those aspects of the controversy which are within its regulatory authority.

STATUTORY PROVISIONS INVOLVED

This case involves sections 201(a)-201(b), 203(a)-203(e), 204, 205(a), 211(a), 213(a)-213(h), 214(a)-214(d), 215(a)-215(c), 218, 313 of the Communications Act of 1934[2] which are set forth in Appendix C. Sections 558, 701, 766 of the California Public Utilities Code are also set forth in Appendix C.

STATEMENT OF THE CASE

Real parties in interest and plaintiffs are Citizens Utilities Company and its wholly owned subsidiary, Citizens Utilities Company of California (C.A. Appx., pp. 2-3[3]). The parent company is a public utility holding corporation with power, telephone and water interests in various states. Citizens Utilities Company of California (hereinafter "Citizens") operates water and telephone businesses in Northern California (C.A. Appx., p. 3). Petitioners and defendants are American Telephone and Telegraph Company (hereinafter "American"), its subsidiary, The Pacific Telephone and Telegraph Company (hereinafter "Pacific") and Pacific's subsidiary, Bell Telephone Company of Nevada (hereinafter "Bell of Nevada") (C.A. Appx., p. 3).

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[2]48 Stat. 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1087, 47 U.S.C. §§ 201(a)-201(b), 203(a)-203(e), 204, 205(a), 211(a), 213(a)-213(h), 214(a)-214(d), 215(a)-215(c), 218, 313.

[3]These appendix citations refer to the appendix which was before the Court of Appeals on the petition for mandamus. It will hereinafter be referred to as "C.A. Appx., p. ." References to the appendices attached to this petition will be referred to as "Appendix ."

The telephone lines of Citizens interconnect with the lines of American, Pacific and Bell of Nevada and the companies "interchange" calls (C.A. Appx., pp. 4, 5); that is, telephone calls from an area served by one company to an area served by another company pass over the lines of both companies. Through the facilities of Pacific and Bell of Nevada and other companies with which they connect, Citizens' subscribers can place or receive calls to or from practically any point in the United States and foreign countries.[4] Rates or charges for interchanged calls are established as follows: a tariff (schedule of rates) is filed by the Bell System company with the Federal Communications Commission and the appropriate state agencies (C.A. Appx., p. 25). An independent (any non-Bell System company) whose facilities are used in interchanged calls usually "concurs" in the Bell companies' tariffs (C.A. Appx., p. 25). Citizens has not withdrawn its concurrence in those tariffs (C.A. Appx., pp. 35-47).

Interchanged calls of necessity use the facilities of more than one company, and each company is entitled to a share of the revenues produced. The division of such revenues or "settlements" is determined by a "traffic

[4]For example, a call from an area served by Citizens to New York utilizes lines of Citizens, Pacific, American and either the Bell company in New York or an independent. If the call was placed in Alturas, California (served by Citizens), it would be carried on Citizens' lines to a connection with Pacific's lines and on Pacific's lines to a point where Pacific's lines connect with the Long Lines owned and operated by American; the call is then carried on American's Long Lines to a connection with toll lines of the New York Telephone Company and then over toll lines of the New York Telephone Company to the particular exchange the customer in California desired to reach; the call is then completed over local facilities of the New York Telephone Company or an independent (C.A. Appx., pp. 69-73).

agreement" entered into by the involved companies (C.A. Appx., pp. 25, 50). At all pertinent times such agreements were required to be filed with the Federal Communications Commission (48 Stat. 1073, 47 U.S.C. § 211(a))[5] and in the case of companies interchanging calls within California, they are also filed with the California Public Utilities Commission (C.A. Appx., p. 50). The procedures used for determining the division of revenue are based upon studies (called separations studies) by which the costs and property used in providing service are allocated between the traffic which is interchanged by the involved companies and that which is not interchanged. Those procedures are exceedingly complex (C.A. Appx., pp. 25-27, 50-51), and involve the Uniform System of Accounts prescribed by the Federal Communications Commission (47 C.F.R. §§ 31.01-31.707).

Citizens, Bell of Nevada and Pacific entered into a traffic agreement in 1950 which was modified in 1957 (C.A. Appx., pp. 59-67). While negotiating the 1957 modification of the traffic agreement, Citizens asserted that the earlier

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[5]In 1970, the Federal Communications Commission modified its rules to require that traffic agreements be kept on file by the involved companies (47 C.F.R., §§ 43.51(a)(2) and 43.51(d)). The Commission, however, made it clear that the modification in no way affected its powers. In its report on the modification, the Commission stated

> "We deem Section 43.51 of the rules, as amended herein, to be in compliance with Section 211 of the Communications Act, 47 U.S.C. § 211, in that the objectives of that provision shall neither be frustrated nor defeated by the mere change in location of the repository of certain documents. Rather, the alleviation of the burden upon subject telephone carriers of the duplicating and filing of these documents with the Commission, and the removal of the further burden upon the Commission of maintaining these filings is clearly in the public interest" (*Telephone Companies—Tariff Agreements*, 26 F.C.C.2d 412, 414-415).

agreement had been unfair and demanded payment of additional settlements retroactive to January 1, 1953 (C.A. Appx., p. 74). The modification of the traffic agreement was executed, reserving Citizens' claim for the additional retroactive settlements (C.A. Appx., p. 59). Later, Citizens expanded its claim to demand additional retroactive settlements back to 1950 (C.A. Appx., pp. 75-76).

Neither Citizens nor its parent has ever presented the settlement dispute to any regulatory agency for resolution. Instead, they filed a complaint in the District Court for the Northern District of California, the thrust of which was that American had conspired with its subsidiary Pacific, and Pacific's subsidiary, Bell of Nevada, to restrain and monopolize trade and commerce in interchanged telephone traffic—specifically, that petitioners had fixed the settlements at an unfair or unreasonable level—in violation of sections 1 and 2 of the Sherman Act (C.A. Appx., pp. 77-85). An amended complaint was subsequently filed (C.A. Appx., pp. 2-10).

Petitioners moved the district court for a summary judgment dismissing the action on the grounds that the subject matter of the action—the division of revenues of interchanged calls—is entirely regulated and does not involve competition of any sort (C.A. Appx., pp. 98-99). Telephone companies do not compete in providing local service, i.e., for subscribers. Nor do they compete in providing interchange telephone service. Each company interconnects its lines with the lines of companies adjacent to its service areas so that the subscribers of every telephone company are provided with worldwide service. Moreover, the reasonableness of the division of revenue is a matter

for determination by the Federal Communications Commission and the California Public Utilities Commission. This motion was denied (Appendix B, p. x).

After the district court's denial of petitioners' motion, this Court decided *Ricci v. Chicago Mercantile Exchange* (1973) 409 U.S. 289 and *Hughes Tool Co. v. Trans World Airlines* (1973) 409 U.S. 363. Petitioners thereafter moved the district court to stay or dismiss the action on the ground that *Ricci* and *Hughes Tool,* read in conjunction with the authorities previously cited to the district court, required that the action be at least stayed pending submission of the basic facts to the commissions having primary jurisdiction (C.A. Appx., pp. 107-108).

Citizens opposed the motion, citing *Otter Tail Power Co. v. United States* (1973) 410 U.S. 366, which had been decided subsequent to the making of petitioners' motion. The district court refused to dismiss the complaint, refused to stay the proceedings pending submission of the facts to the commissions, and refused petitioners' request to certify the matter for interlocutory appeal and decision under 28 U.S.C. § 1292(b) (Appendix B, pp. ii-iv), although the question involved clearly seemed to fall within the letter and purpose of that statute.[6]

Petitioners filed a petition for a writ of mandamus or, in the alternative, for a writ of prohibition in the Court of Appeals for the Ninth Circuit, seeking an order direct-

[6]The statute was intended to avoid judicial waste by permitting an interlocutory appeal where the "order involves a controlling question of law as to which there is substantial ground for difference of opinion and [where] * * * an immediate appeal from the order may materially advance the ultimate termination of the litigation" (28 U.S.C. § 1292(b)).

ing a stay of the proceedings in the district court until the plaintiffs had presented their claims to the appropriate regulatory commissions or an order dismissing the action. The Court of Appeals denied the petition without explanation (Appendix A).

REASONS FOR GRANTING CERTIORARI

I. THE DECISIONS OF THIS COURT AND EVERY OTHER COURT WHICH HAVE CONSIDERED THE QUESTION ESTABLISH THAT THE FEDERAL COMMUNICATIONS COMMISSION HAS JURISDICTION OVER THE CLAIMS MADE IN THE CASE AT BAR. CONGRESS INTENDED THAT COMMISSION, AND NOT THE COURTS, TO DETERMINE SUCH CLAIMS.

The district court's determinations with respect to the jurisdiction of the Federal Communications Commission disregard the decisions of this Court and of every other appellate court which has considered the question and which hold that in a pervasively regulated industry such as interstate telephone service, the federal agency should dispose of claims such as those in the case at bar.

A. Interstate telephone service, generally, and interchange telephone service, specifically, is pervasively regulated by the Federal Communications Commission.

This Court has held that under the Communications Act of 1934 (48 Stat. 1064, 47 U.S.C. §§ 151, et seq.), the interstate telephone industry is one which is *pervasively* regulated *(United States v. R. C. A.* (1959) 358 U.S. 334, 348-350).

In particular, the Communications Act (48 Stat. 1064, 47 U.S.C. §§ 151, et seq.) provides for extensive regulation and supervision by the Federal Communications Commission of interchange telephone service—the subject of the instant case. Under 47 U.S.C. § 201, the Federal Communications Commission has full power to order telephone companies to interchange interstate calls, to establish the charges for such calls, to establish the division of such charges between companies and to insure that all charges and practices are just and reasonable:

> "(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, *to establish physical connections with other carriers,* to establish through *routes and charges applicable thereto and the divisions of such charges,* and to establish and provide facilities and regulations for operating such through routes.
>
> "(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful * * * " (47 U.S.C. § 201; emphasis added).

The Commission may suspend the effective date of any proposed charge, classification, regulation or practice, and it has the authority to hold hearings to determine if any proposed or existing charge, classification, regulation or

practice is lawful, just, fair and reasonable and to order a company to act in accordance with its determinations (47 U.S.C. §§ 204, 205).

The Communications Act further provides that once an interconnection is made, there can be no disconnection without prior Commission approval (47 U.S.C. § 214); that each telephone company must file with the Federal Communications Commission schedules showing all interstate charges for itself and its connecting carriers (47 U.S.C. § 203(a)); that no company may charge more or less than the filed schedules provide (47 U.S.C. § 203(c)), and that no change can be made in the charges without notice to the Commission (47 U.S.C. § 203(b)).

The Act also provides that all contracts, arrangements or agreements with other telephone companies be filed with the Federal Communications Commission (47 U.S.C. § 211(a)); that the Federal Communications Commission may fix the value of property owned or used by a telephone company in interstate communications (47 U.S.C. § 213); that the Commission may prohibit acquisitions of additional facilities by a telephone company (47 U.S.C. § 214); that the Federal Communications Commission shall examine transactions entered into by telephone companies relating to interstate charges or services (47 U.S.C. § 215); and that the Commission may broadly inquire into the management of the business of all carriers (47 U.S.C. § 218).

It is evident from the above that not only is the interstate telephone industry pervasively regulated but that the Federal Communications Commission has been given explicit statutory authority over the subject at issue—

division of charges from interchanged calls. Indeed, the Commission has expressly so held.[7]

The Commission has the power to hold hearings to determine whether the division of revenue agreed upon is lawful, just, fair and reasonable (47 U.S.C. §§ 205, 204, 201(b)). It also has the power and the means to obtain all information necessary to determine whether the division of revenue is in accordance with the policy of the Act (47 U.S.C. §§ 213, 215, 218), and the power to order action in conformity with its determinations (47 U.S.C. § 205). In other words, Congress gave the Federal Communications Commission jurisdiction over division of revenue from interchanged interstate calls and the power to completely determine the correctness of such division.[8]

Determination of the reasonableness of division of revenue arrangements requires a comprehensive understanding of the relations between the utilities involved, espe-

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[7]In *In the Matter of American Telephone & Telegraph Co.* (1969) 20 F.C.C.2d 886, 887, the Commission answered an allegation that interstate rate reductions in which the independents allegedly had no voice would reduce the independents' revenue from interchanged calls by pointing out that the independent had a remedy, it could "seek a revision in its share of the joint rate • • • by petition to the appropriate regulatory authority."

[8]The California Legislature has likewise given the California Public Utilities Commission plenary power over intrastate service by all telephone companies (Pub.Util.Code, § 701) and, in particular, over intrastate interconnection arrangements (Pub.Util.Code, §§ 558, 766). The California Public Utilities Commission has entertained proceedings involving the division of revenue on interchanged calls (Cal.P.U.C. Decision No. 67172 (1964) 62 Cal. P.U.C. 637, 643; Cal.P.U.C. Decision No. 74917 (1968) 69 Cal. P.U.C. 53, 94). In fact, the 1957 modification of the traffic agreement involved in this case (C.A. Appx., p. 59) shows on its face that its terms were dictated in part by a decision of the California Commission (Cal.P.U.C. Decision No. 50258 (1954) 53 Cal.P.U.C. 275, 310).

cially in light of the necessity for harmonizing the prospective effects of any judgment with the ongoing administration of the Communications Act as it applies to all interconnecting telephone companies. The Commission has the required expertise; the district courts do not.

It was clearly not Congress' intent when it fashioned the detailed scheme of regulation for interstate telephone service in the Communications Act of 1934 to leave it to the whim of the regulated utilities as to whether a dispute over the fairness of interconnection agreements should, in the first instance, be brought to the Commission or to the federal courts. Indeed, such a policy would be contrary to the basic purposes for having regulatory agencies. Congress provided the Federal Communications Commission with the authority and the means to deal with Citizens' claims (supra, pp. 10-12). Moreover, the Commission is fully empowered to consider antitrust implications in its review of the validity of the division of revenue (*Carter v. American Telephone & Telegraph Company* (5 Cir. 1966) 365 F.2d 486, 495, certiorari denied (1967) 385 U.S. 1008). The *Carter* court relied on this Court's decision in *United States v. R. C. A.* (1959) 358 U.S. 334, 348 quoting the following from that decision:

> "'Accordingly, this Court consistently held that when rates and practices relating thereto were challenged under the antitrust laws, the agencies had primary jurisdiction to consider the reasonableness of such rates and practices in the light of the many relevant factors including alleged antitrust violations, for otherwise sporadic action by federal courts would disrupt an agency's delicate regulatory scheme, and would throw existing rate structures out of balance'" (365 F.2d 495, fn. 15).

B. The pervasive regulation of telephone service shows that the determination of the reasonableness of the division of interstate revenues is within the exclusive jurisdiction of the Federal Communications Commission.

The necessary effect of the pervasiveness of regulation of telephone communications, generally, and division of revenues, specifically, is to create an antitrust immunity in the case at bar. This principle was set forth in *U. S. v. Philadelphia Nat. Bank* (1963) 374 U.S. 321, 351, where in discussing its holding in *Pan American World Airways v. U. S.* (1963) 371 U.S. 296, this Court stated:

> "the Sherman Act could not be applied to facts composing the precise ingredients of a case subject to the Board's broad regulatory and remedial powers" (374 U.S. 351).

This Court has pointed out that regulation of communications service is pervasive and that Congress intended to substitute supervision for competition in the telephone industry:

> "That there is a national policy favoring competition cannot be maintained today without careful qualification. * * *
>
> "Prohibitory legislation like the Sherman Law, defining the area within which 'competition' may have full play, of course loses its effectiveness as the practical limitations increase; as such considerations severely limit the number of separate enterprises that can efficiently, or conveniently, exist, the need for careful qualification of the scope of competition becomes manifest. Surely it cannot be said in these situations that competition is of itself a national policy. To do so would disregard not only those areas of economic activity so long committed to government

monopoly as no longer to be thought open to competition, * * * and those areas, loosely spoken of as natural monopolies or—more broadly—public utilities, in which active regulation has been found necessary to compensate for the inability of competition to provide adequate regulation. * * *

"* * * Congress may have considered the possible inconvenience to the public of duplicate facilities—as would more clearly be the case with telephones—or the possible inadequacy of the demand for international communications to make more than one enterprise economically or socially desirable. Whatever the reasons, they are not for us to weigh; it is for us to recognize that encouragement of competition as such has not been considered the single or controlling reliance for safeguarding the public interest" *(F. C. C. v. RCA Communications, Inc.* (1953) 346 U.S. 86, 91-92, 93).

Later this Court emphasized the pervasive regulation of the telephone industry. It distinguished the broadcasting industry from the telephone industry in *United States v. R. C. A.* (1959) 358 U.S. 334:

"While the television industry is also a regulated industry, it is regulated in a very different way. *That difference is controlling.* Radio broadcasters, including television broadcasters, * * * are not included in the definition of common carriers in § 3 (h) of the Communications Act, 47 U. S. C. § 153 (h), as are telephone and telegraph companies. Thus the extensive controls, including rate regulation, of Title II of the Communications Act, 47 U. S. C. §§ 201-222, do not apply. Television broadcasters remain free to set their own advertising rates. As this Court said in *Federal Communications Comm'n v. Sanders Bros. Radio Station,* 309 U. S. 470, 474:

> '*In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly* in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition as it has done in the case of railroads . . . . '
>
> Thus, there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears" (358 U.S. 348-350; emphasis added).

Action by the district court in the case at bar would constitute regulation of the utilities involved. It would, moreover, directly affect the rate structures of the telephone companies involved. Rates a telephone company may charge are determined by the regulatory commissions after consideration of the entire business of the utility. Its "plant," i.e., property used in providing services, and its gross revenue and expenses are taken into account in determining rates which will provide sufficient revenue to realize the "rate of return" the commissions allow it. The amount of its revenue is increased or decreased in these calculations by increases or decreases in the amount of its settlements. This relationship between rates allowed to be charged and settlements is succinctly stated in *General Teleph. Co. v. Ohio Bell Teleph. Co.* (1961) 39 PUR

3d 65 (affirmed by the Supreme Court of Ohio (1962) 184 N.E.2d 88):

> "The rates that the commission prescribes for each type, class, and grade of service will produce the revenue required to meet what the commission has determined to be the utilities' 'allowable gross annual revenues.' • • • the toll settlements paid to independent companies for interchanged state toll business are deducted from Ohio Bell's revenues or are treated as an expense, either of which produces substantially the same results.
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> • • • • •
>
> "In fixing rates for an independent company, the commission determines General's total revenue requirements based upon its total rate base, expenses, taxes, and reserve and a fair rate of return. From these total revenue requirements, the commission then deducts the total settlement received from the Ohio Bell. The remainder represents that portion of General's required revenues which must be recovered from General's other operations. • • •
>
> "It is evident, therefore, that the level of exchange telephone rates and rates for I-I business to be fixed for General are governed in substantial part by the amount of toll settlement General may receive from Ohio Bell • • • " (39 PUR 3d 76-77).

It follows from the above, that the present case involves that portion of telephone service which is a lawful, fully regulated monopoly. Competition (and therefore the Sherman Act) plays no part in determining what is a fair division of revenues between connecting telephone companies. These matters lie entirely within the regulatory jurisdiction of the Federal Communications Commission and the appropriate state agencies.

Citizens could have brought its claim before the Federal Communications Commission (47 U.S.C. § 205) to obtain a determination as to the fairness or reasonableness of the division of revenue. It is irrelevant that it did not do so. Prior action by an administrative agency is not the basis of primary or exclusive jurisdiction; what is crucial is the statutory power to regulate when the issue is brought to the Commission's attention:

Texas & Pac. Ry. v. Abilene Cotton Oil Co. (1907) 204 U.S. 426, 440;

Balt. & Ohio R. R. v. Pitcairn Coal Co. (1910) 215 U.S. 481, 493-494, 498;

Mitchell Coal Co. v. Penna. R. R. Co. (1913) 230 U.S. 247, 257, 266-267;

Carnation Co. v. Pacific Conference (1966) 383 U.S. 213, 220-221;

U. S. Nav. Co. v. Cunard S. S. Co. (1932) 284 U.S. 474, 486-487.

In the instant case, the Federal Communications Commission has the means and complete authority to determine the correctness of Citizens' claims. Under the legislative scheme this is a totally adequate and exclusive remedy.

The reasoning of the Court's most recent decisions involving jurisdiction of federal administrative agencies lends additional support to the fact that the Federal Communications Commission has exclusive jurisdiction of the matters in issue here. In *Otter Tail Power Co. v. United States* (1973) 410 U.S. 366, the Court affirmed a decree which enjoined Otter Tail from refusing to wholesale electric power to competing municipal power systems—

activities, the Court noted, which aided an attempt to monopolize retail power distribution. The decree provided that the wholesaling would be done under " 'terms and conditions which are filed with and subject to approval by the Federal Power Commission' " (410 U.S. 375), thus leaving to the Commission's jurisdiction those particular matters which are of the kind involved in this case, namely, the terms and conditions of interconnection. Moreover, the Court in *Otter Tail* pointed out that the pervasiveness of regulation (or lack thereof) was crucial to its determination that the antitrust laws could have any application to the industry involved (410 U.S. 372-374). It recognized that

> "It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships" (410 U.S. 374).

The Court stated that Congress, in passing Part II of the Federal Power Act, had been concerned with " 'restraint of free and independent competition' " (410 U.S. 374). It held

> "Thus, there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for or immunize Otter Tail from antitrust regulation for refusing to deal with municipal corporations" (410 U.S. 374-375).

Even the dissent in *Ricci v. Chicago Mercantile Exchange* (1973) 409 U.S. 289, while disagreeing with the majority holding that the Commodity Exchange Commission had primary jurisdiction, recognized that im-

munity would be found "in those rare cases where regulation of the industry is pervasive and Congress plainly intended to substitute Government supervision for competition" (409 U.S. 314). The case at bar is one of those rare cases. Congress adopted a pervasive regulatory scheme for controlling interstate telephone communications. Moreover, the Communications Act of 1934 which deals with both the telephone and radio industries, unlike the Federal Power Act construed in *Otter Tail,* is *not* generally concerned with removing the restraint on "free and independent competition" with respect to interstate telephone communications. To the contrary, Congress made the antitrust laws specifically applicable only to the manufacture, sale and trade of radio apparatus (47 U.S.C. § 313). The broad authority of the Federal Communications Commission over telephone communications, generally, and over division of revenues, specifically, was intended to be a substitute for the antitrust laws.

C. Even if the Federal Communications Commission does not have exclusive jurisdiction, its primary jurisdiction requires that the district court proceedings be stayed pending a determination by the Commission.

Even if the regulatory scheme did not wholly immunize the conduct complained of from the antitrust laws, the district court would be required, under the doctrine of primary jurisdiction, to stay the proceedings pending determination of the regulatory issues by the Federal Communications Commission. The primary jurisdiction doctrine is founded upon judicial deference for agency jurisdiction, the need for uniformity, application of administrative skills, and the need to avoid the possi-

bility of conflict between the courts and the responsible administrative agency.

In *Ricci v. Chicago Mercantile Exchange* (1973) 409 U.S. 289, plaintiff filed an antitrust complaint alleging that defendants had conspired to restrain his business by transferring to another his membership in the Chicago Mercantile Exchange. This Court held that, because the Commodity Exchange Commission had

> "administrative authority to examine the Ricci-Exchange dispute in the light of the regulatory scheme and Exchange rules, the antitrust action should be stayed until the administrative officials have had opportunity to act" (409 U.S. 302).

In *Ricci,* the Court pointed out that where a regulatory agency may have authority to review the conduct complained of, and where there may be a problem of conflict or coextensiveness of coverage with the agency's regulatory power and the antitrust laws creating questions of exemption from the antitrust laws, the action must be stayed pending proper administrative proceedings (409 U.S. 306-308).

The Court recognized that staying the litigation and submitting the matter to the regulatory agency in the first instance materially aids the determination of whether the regulatory statutes involved are incompatible with the maintenance of an antitrust action and foreclose such an action. The Court summarized its holdings in *Ricci* as follows:

> "We make no claim that the Commission has authority to decide either the question of immunity as

> such or that any rule of the Exchange takes precedence over antitrust policies. Rather, we simply recognize that Congress has established a specialized agency that would determine either that a membership rule of the Exchange has been violated or that it has been followed. Either judgment would require determination of facts and the interpretation and application of the Act and Exchange rules. And either determination will be of great help to the antitrust court in arriving at the essential accommodation between the antitrust and the regulatory regime: The problem disappears entirely if it is found that there has been a violation of the rule; on the other hand, if it is found that the Exchange has merely followed and enforced its own rules, the antitrust court will be in a position to make a more intelligent and sensitive judgment as to whether the antitrust laws will punish what an apparently valid rule of the Exchange permits" (409 U.S. 307-308).

This reasoning applies a fortiori to the case at bar. The Commission entrusted with the regulation of interstate telephone service should first prescribe the division of revenue. The standards to be applied are those provided for under the regulatory scheme. The antitrust court would then be in a position to base its decision on concrete facts, not on hypotheticals or abstract theory.

There is even more reason for deferral to administrative action in the instant case than there was in *Ricci*. The commodity exchanges were not subject to pervasive regulation as is interstate telephone communications. Nor unlike the instant case, was it clear in *Ricci* that the conduct in question was within the jurisdiction of the Commission.

Even the dissenting opinion in *Ricci*, written by Justice Marshall in which Justices Douglas, Stewart and Powell joined, requires that there be a stay in the instant case. That dissent questioned the jurisdiction of the Commodity Exchange Commission over any aspect of the dispute, and also its expertise (409 U.S. 309-310), but recognized that Congressional grant of pervasive regulatory power can give rise to antitrust exemption (see supra, pp. 19-20). The instant case involves the exercise by Congress of pervasive regulatory power. Both the majority opinion in *Ricci* and the dissenting opinion of Justice Marshall require at least a stay.[9]

Carter v. American Telephone & Telegraph Company (5 Cir. 1966) 365 F.2d 486, certiorari denied (1967) 385 U.S. 1008, illustrates the delicate balance between the various aspects of the telephone industry, the intent of Congress when it sought pervasively to regulate that industry and the necessity of at least staying court action until decision of the Federal Communications Commission. In *Carter*, the court held that the antitrust action, which involved an alleged conspiracy to prevent the use by telephone subscribers of a device manufactured by Carter, should be stayed. The court pointed out:

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[9]The district court in its final ruling on primary jurisdiction relied upon *Otter Tail Power Co. v. United States* (1973) 410 U.S. 366 (Appendix B, p. iii), and ignored the pervasive regulation of the telephone interstate industry which, as shown above (supra pp. 18-20), distinguishes this case from *Otter Tail*. In its prior ruling (Appendix B, p. ix) the court had relied upon *Carnation Co. v. Pacific Conference* (1966) 383 U.S. 213. In this it not only ignored the pervasive regulation involved in this case but also the fact that in *Carnation* this Court gave recognition to the doctrine of primary jurisdiction by authorizing a stay pending administrative action (383 U.S. 222-223).

> "The starting point is the Communications Act of 1934, 47 U.S.C.A. § 151 et seq. * * * The execution of the statutory scheme is committed to the FCC. And this structure, with infinite detail, undertakes to subject communication utilities to refined and comprehensive regulation" (365 F.2d 494).

The court noted that tariffs on file with the Federal Communications Commission regulated the use of the device and held that

> "the telephone utility is required to file in its schedules and tariffs 'the classifications, practices, and regulations affecting such charges,' 47 U.S.C.A. § 203(a). The 'classifications, practices, and regulations,' as well as the charges, must be 'just and reasonable.' 47 U.S.C.A. § 201(b). The Commission is empowered to determine whether they are and its power extends to determining 'what classification, regulation, or practice is or will be just, fair, and reasonable.' 47 U.S.C.A. § 205(a)" (365 F.2d 496);

and that

> "There is, thus, the strong possibility that all, or a principal part, of the antitrust suit will effectually be determined by the resolution by the FCC of the validity and application of the tariff to Carterphone" (365 F.2d 497).

The traffic agreement which is at the center of the controversy in the instant case was required to be filed with the Commission (supra, pp. 6, 11) as was the tariff in *Carter;* it was subject to the Commission's power to determine whether it was just, fair and reasonable as was the tariff in *Carter,* and the traffic agreement clearly af-

fects the charges set forth in the tariff (supra, pp. 16-17). The court in *Carter* stayed the court proceedings; likewise, a stay is required in the case at bar.

II. THE INEXCUSABLE WASTE OF JUDICIAL TIME WHICH A USELESS ANTITRUST TRIAL WILL INCUR IF THE DISTRICT COURT'S DECISION STANDS WARRANTS THE EXERCISE OF THIS COURT'S EXTRAORDINARY JURISDICTION IN EFFECTUATING THE APPROPRIATE ADMINISTRATION OF THE FEDERAL COURTS.

The district court's decision is clearly erroneous. The only open question is whether the issue presented warrants the exercise of this court's extraordinary certiorari jurisdiction at this stage of the case.

This Court is familiar with the problems of congestion in the Federal courts. A trial of this case would consume a large amount of time and would involve complicated issues requiring the exercise of highly technical expertise. Since Citizens' claim for damages is based upon a contention that it did not realize a reasonable rate of return on its telephone plant devoted to interchange traffic, the court would have to determine whether the separation procedures used by the parties pursuant to the traffic agreement are fair and reasonable. Those procedures are exceedingly complex and involve the Uniform System of Accounts prescribed by the Federal Communications Commission (47 C.F.R. §§ 31.01-31.707). The court in order to determine the reasonableness of the division of revenues, would have to choose between possible procedures for segregating the cost of telephone plant into categories, i.e., identifying the plant assignable to each

category and determining the cost of each, either by application of allocation methods or by direct assignment, and would have to devise parallel methods of assigning or allocating expenses. Such a proceeding would embrace all of the issues of a complex rate case: it would require the court to separate the independent company's plant and expenses used in interchange telephone traffic from its other plant and expenses, and then to determine an appropriate rate of return on the plant so used. Such a proceeding would be an inexcusable waste of judicial time since the authorities are clear that ultimately it must be determined that the Federal Communications Commission had exclusive or at least primary jurisdiction.

But the implication of the district court's action goes further in portending wasteful strain on the judiciary. It opens the door for every telephone company in the country to institute suits in the federal district courts under the guise of antitrust claims to determine the propriety of their divisions of revenue from interstate interchanged calls.

While mandamus is an extraordinary remedy, it is the proper means of correcting the improvident exercise of jurisdiction by the district court. In *U. S. Alkali Assn. v. U. S.* (1945) 325 U.S. 196, this Court determined that when a district court's action may interfere with the exercise of a federal commission's primary jurisdiction, the propriety of the court's action may be tested by extraordinary writ (325 U.S. 203-204). The courts of appeals of various circuits have acknowledged their power to test the propriety of a grant or denial of a stay by mandamus

to prevent duplication of proceedings *(Filtrol Corporation v. Kelleher* (9 Cir. 1972) 467 F.2d 242, 244, certiorari denied (1973) 409 U.S. 1110; *ACF Industries, Incorporated v. Guinn* (5 Cir. 1967) 384 F.2d 15, 18; *Chronicle Publishing Co. v. National Broadcasting Co.* (9 Cir. 1961) 294 F.2d 744; *American Airlines v. Forman* (3 Cir. 1953) 204 F.2d 230, 232).

The compelling necessity of the exercise of this Court's extraordinary jurisdiction at this time is brought out by Chief Justice Burger in his dissent in *Hughes Tool Co. v. Trans World Airlines* (1973) 409 U.S. 363, where, after more than eleven years of litigation, the Court ordered that the antitrust action be dismissed because of the regulatory authority of the Civil Aeronautics Board. In reference to the failure of the Court to decide the same issue when the case had previously been before it, Chief Justice Burger stated:

> "Returning to the 1964 efforts of Toolco to have the Court resolve the issue of the Board's authority with respect to the antitrust issue, it is elementary, of course, that a denial of a petition for certiorari decides nothing. It is also true that dismissal of a petition as improvidently granted, after full oral argument and briefing, is not a judgment on the merits in any sense. But when parties to litigation reach that stage and the Court fails to respond with a decision on the merits, lawyers read that as a signal that the case should proceed. These parties did so —for nine years and more than 15 million dollars in legal expense—only to be told by the Court now that on the facts there is no legal liability—the very issue that could as well have been decided in 1964 as today" (409 U.S. 411-412).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS R. KIRKHAM
JAMES MICHAEL
NOBLE K. GREGORY
ROBERT M. WESTBERG
MICHAEL H. SALINSKY
Attorneys for Petitioner

F. MARK GARLINGHOUSE
JAMES A. DE BOIS
PILLSBURY, MADISON & SUTRO
Of Counsel

(Appendices Follow)

Appendix A

In the United States Court of Appeals
for the Ninth Circuit

No. 73-1816

[Filed Jul. 10, 1973]

American Telephone and Telegraph Company, The Pacific Telephone and Telegraph Company, and Bell Telephone Company of Nevada, corporations,

Petitioners,

vs.

United States District Court for the Northern District of California,

Respondent.

Citizens Utilities Company and Citizens Utilities Company of California, Corporations,

Real Parties in Interest.

ORDER

Before: MERRILL and WRIGHT, Circuit Judges

Writ denied.

Charles M. Merrill

Eugene A. Wright

Appendix B

In the United States District Court
for the Northern District of California

Civil No. 39483 GBH

Citizens Utilities Company and Citizens Utilities Company of California, a corporation,
Plaintiffs,

vs.

American Telephone and Telegraph Company, The Pacific Telephone and Telegraph Company, and Bell Telephone Company of Nevada, corporations,
Defendants.

[Filed Apr. 5, 1973]

ORDER DENYING DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

On May 25, 1972, this court entered its Memorandum and Order denying defendants' motion for summary judgment. Thereafter, in reliance upon two newly-decided Supreme Court cases, defendants renewed their motion for summary judgment on February 12, 1973. Plaintiffs oppose said renewal, placing reliance upon a still more recent Supreme Court case.

The trio of new Supreme Court cases are *Ricci v. Chicago Mercantile Exchange, et al.*, ... U.S. ....., 93 S.Ct. 573 (Jan. 9, 1973); *Hughes Tool Company v. Trans World Airlines,* ..... U.S. ....., 93 S.Ct. 647 (Jan. 10, 1973); and *Otter Tail Power Company v. United States,* ..... U.S. ....., 93 S.Ct. 1022 (Feb. 22, 1973). Although these cases may not be wholly consonant with one another (see, e.g., Justice Stewart's concurring and dissenting opinion in *Otter Tail*), a reading of all three, and particularly *Otter Tail,* does not convince the court that it should reverse its earlier ruling and now grant summary judgment in defendants' favor.

Defendants have requested that in the event their motion be denied, that this court certify the matter for interlocutory appeal and decision under 28 U.S.C. §1292. This request is denied.

Defendants have also expressed their desire to seek extraordinary relief from the appellate courts should this court deny their motion for summary judgment. In view of this, defendants are hereby granted a stay of ten (10) days from the instant Order in which to pursue such appellate relief as may be available.

Accordingly, defendants' renewed motion for summary judgment is denied. Defendants' request for certification under §1292 is denied. Defendants are granted a stay for the period of ten (10) days.

It is so ordered.

Dated: Apr. 5, 1973

/s/ George B. Harris
United States District Judge

District Court of the United States
Northern District of California

Civil No. 39483 GBH

Citizens Utilities Co.,
et al

vs.

American Telephone & Telegraph Co.,
et al

NOTICE

TO Law Offices of Joseph L. Alioto
111 Sutter St., Suite 2100
San Francisco 94104
James Michael, Esq.
William C. Miller, Esq.
Attorneys at Law
Pillsbury, Madison & Sutro
225 Bush Street
San Francisco 94104

You Are Hereby Notified that on April 6, 1973

Judge George B. Harris ordered that defendants' motion for a stay of the litigation, presented alternatively to defendants' motion for summary judgment, heretofore denied, is hereby denied. Further, It Is Ordered, that the presently set trial date of April 16, 1973, is hereby vacated; the date of trial to be reset on stipulation of counsel.

San Francisco, California
April 6, 1973

Charles J. Ulfers, Clerk
by: Peter C. Grace
Deputy Clerk

In the United States District Court
Northern District of California

No. 39483 GBH

Citizens Utilities Company and Citizens Utilities Company of California, corporations,

Plaintiffs,

vs.

American Telephone and Telegraph Company, The Pacific Telephone and Telegraph Company, and Bell Telephone Company of Nevada, corporations,

Defendants.

[Filed May 26, 1972]

MEMORANDUM AND ORDER DENYING MOTION FOR SUMMARY JUDGMENT

This action arises from an antitrust complaint originally filed in 1960. Plaintiffs are a parent public utility holding corporation and a subsidiary company, located in California. Defendants are Bell System Companies. Telephone lines interconnect between the territories of plaintiffs and defendants and the charge for calls over them is divided between the companies.

Plaintiffs allege that as the result of an unlawful combination or conspiracy that they have paid out monies

they would not otherwise have paid out. Plaintiffs contend that defendants have fixed prices, and have acted in restraint of trade through the "traffic agreements" by which the allocation rates between interconnecting companies' lines are set.

The instant suit had its genesis in a 1957 dispute between plaintiff Citizens of California and defendant Pacific when the former requested additional monies, claiming its earlier "settlement" agreements had been inequitable. Pacific balked over making such payments retroactively, and this suit resulted.

Defendants now move this court for summary judgment in their favor. They do *not* contend that telephone companies are immune from suit under antitrust laws. They *do* contend that division of revenues from interchanged calls, even if the result of a combination or conspiracy, is *not* subject to the antitrust laws.

Citizens' request for more monies in 1957 was predicated on a change in its methods of costs. In allocating revenues, the "traffic agreements" provide for a participating company to receive back its costs plus a predetermined rate of return. Two main methods for determining such initial cost were used. One used an industry-wide average, the other looked to the actual costs incurred by the company in question. Citizens determined in 1957 that the latter method would be more profitable to it and it urged it upon Pacific.

The thrust of defendants' motion is that competition does not exist in the telephone industry. Rather, administrative regulation has taken its place. The FCC, for instance, is vested with authority to order telephone com-

panies to interchange calls, to establish rates therefor, and prescribe the basis upon which such charges are to be divided between companies. (The California Public Utilities Commission ("CPUC") has similar provisions.) Thus it is defendants' position that resort to the antitrust laws is inappropriate here because of the availability of regulatory channels to handle any grievances complained of: cases are cited in which agencies have in fact undertaken to resolve disputes such as that now before the court. Defendants claim there is no cited case wherein a court has tried a dispute over the method to be used for dividing revenues between interchanged calls. Moreover, no case is to be found where a court has accepted jurisdiction of an antitrust case involving common carrier telephone operations between telephone companies.

In addition to the argument that this matter is one that should be handled administratively, defendants also contend that, as between the parties to this action, there is no area in which competition does, or is intended by Congress to exist. Accordingly, there can be no "restraint" on competition where there is no competition. Every aspect of the telephone business is regulated.

Defendants contend finally that they cannot be charged with price-fixing since there are here no "prices": no buyer-seller relationship and no product or service sold for a price. Defendants point out that the other allegations are equally insufficient in law if not in fact.

Citizens answers by noting that the presence of regulation cannot relieve defendants from their antitrust tort liability, and that there has been no explicit repeal of any of the antitrust legislation urged as respects telephone companies. Citizens relies procedurally on the axiom that

summary judgment is to be used sparingly where complex antitrust issues present themselves.

Citizens argues that no agency has ever regulated the particular cents-per-message settlements between it and Pacific which generated the instant controversy, nor has the "actual cost" method ever been so regulated. Citizens seems to concede that it could have terminated its traffic agreements, but claims that such act would have been meaningless.

Citizens urges that defendants' conduct does amount to proscribed price-fixing, and that no immunity exists for this. It argues further that the regulatory scheme does not provide an exclusive remedy and that such scheme would not be distorted by recovery in this suit.

Defendants' main arguments may be summarized as two-fold: (1) there is no jurisdiction here because, explicitly or implicitly, this matter belongs before the appropriate regulatory agencies which have, should, and can continue to resolve any disputes under already-existing mechanisms and without resort to the courts; (2) there is no jurisdiction here under the antitrust laws because those laws apply where there is or is supposed to be competition which can be restrained; what we have here are government-sanctioned monopolies and no competition as between the instant parties.

The first argument does not support a granting of summary judgment. Although it does appear that the FCC and/or the CPUC *could* adjudicate and *have* adjudicated controversies regarding revenue divisions for interchanged calls, there is no firm authority for the proposition that an agency has *exclusive* jurisdiction thereover so as to oust this court's jurisdiction in the first instance.

Plaintiffs, in opposition to this argument, place reliance on *Carnation Co. v. Pacific Conference,* 383 U.S. 213, at 217, wherein the court said, in part:

> We do not believe that the remaining provisions of the Shipping Act can reasonably be construed as an implied repeal of all antitrust regulation of the shipping industry's rate-making activities. We recently said: "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank,* 374 U.S. 321, 350-351. We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry. We have, therefore, declined to construe special industry regulations as an implied repeal of the antitrust laws even when the regulatory statute did not contain an accommodation provision such as the exemption provisions of the Shipping and Agricultural Acts. See, *e.g. United States v. Philadelphia National Bank, supra.*

In answer to defendants' contention that "There is no competition between these two companies which can be restrained," with particular reference to the so-called "traffic agreements," plaintiffs have pointed out that their being filed with a regulatory agency should not insulate them from scrutiny if they are otherwise obnoxious to law. The gist of the plaintiffs' claim is that the Bell System companies combine among themselves to determine the formulas by which they settle revenue sharing

with the approximately 1800 independent telephone companies throughout the United States. Plaintiffs note defendants' assertion that there is no competition in their business, but respond that that is the very thing being complained of and, as a factual matter, there *is* competition in the business of allocating or sharing revenues.

Moreover, defendants have admitted the charging allegations of the complaint for the purpose of this motion. Thus they admit having conspired to restrain and monopolize and in fact having restrained and monopolized trade and commerce in interchanged telephone services. It is also admitted that the alleged conspiracy consisted of a continuing agreement to fix prices paid on settlements with the independent telephone companies and to discriminate among independent telephone companies in settlements. These admissions become more significant when viewed against the statements of counsel for defendants that, in their opinion, it would not matter even if the settlement agreements were reached by fraud, duress, or anti-competitive conspiracy. This the court cannot accept.

In the opinion of the court it is manifest that there are issuable facts in the record before the court which cannot be disposed of on a motion for summary judgment.

Accordingly, the motion for summary judgment and for dismissal of the above entitled cause is denied.

Dated: May 25, 1972.

/s/ George B. Harris,
United States District Judge

Appendix C

FEDERAL STATUTES

The pertinent provisions of the Communications Act (47 U.S.C. §§ 151, et seq., 48 Stat. 1064) are:

47 U.S.C. § 201

"(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

"(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided,* That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further,* That nothing in this chapter or in any other provision of law

shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further,* That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter. June 19, 1934, c. 652, Title II, § 201, 48 Stat. 1070; May 31, 1938, c. 296, 52 Stat. 588."

47 U.S.C. § 203

"(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations

affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

"(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

"(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any

privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

"(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

"(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense. June 19, 1934, c. 652, Title II, § 203, 48 Stat. 1070."

47 U.S.C. § 204

"Whenever there is filed with the Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be

proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decided the same as speedily as possible. June 19, 1934, c. 652, Title II, § 204, 48 Stat. 1071."

47 U.S.C. § 205

"(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this

chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

"* * * June 19, 1934, c. 652, Title II, § 205, 48 Stat. 1072."

47 U.S.C. § 211

"(a) Every carrier subject to this chapter shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.

"* * * June 19, 1934, c. 652, Title II, § 211, 48 Stat. 1073."

47 U.S.C. § 213

"(a) The Commission may from time to time, as may be necessary for the proper administration of this chapter, and after opportunity for hearing, make a valuation

of all or of any part of the property owned or used by any carrier subject to this chapter, as of such date as the Commission may fix.

"(b) The Commission may at any time require any such carrier to file with the Commission an inventory of all or of any part of the property owned or used by said carrier, which inventory shall show the units of said property classified in such detail, and in such manner, as the Commission shall direct, and shall show the estimated cost of reproduction new of said units, and their reproduction cost new less depreciation, as of such date as the Commission may direct; and such carrier shall file such inventory within such reasonable time as the Commission by order shall require.

"(c) The Commission may at any time require any such carrier to file with the Commission a statement showing the original cost at the time of dedication to the public use of all or of any part of the property owned or used by said carrier. For the showing of such original cost said property shall be classified, and the original cost shall be defined, in such manner as the Commission may prescribe; and if any part of such cost cannot be determined from accounting or other records, the portion of the property for which such cost cannot be determined shall be reported to the Commission; and, if the Commission shall so direct, the original cost thereof shall be estimated in such manner as the Commission may prescribe. If the carrier owning the property at the time such original cost is reported shall have paid more or less than the original cost to acquire the same, the amount of such cost of acquisition, and any facts which the Commission may require in connection therewith, shall be reported with

such original cost. The report made by a carrier under this subsection shall show the source or sources from which the original cost reported was obtained, and such other information as to the manner in which the report was prepared, as the Commission shall require.

"(d) Nothing shall be included in the original cost reported for the property of any carrier under subsection (c) of this section on account of any easement, license, or franchise granted by the United States or by any State or political subdivision thereof, beyond the reasonable necessary expense lawfully incurred in obtaining such easement, license, or franchise from the public authority aforesaid, which expense shall be reported separately from all other costs in such detail as the Commission may require; and nothing shall be included in any valuation of the property of any carrier made by the Commission on account of any such easement, license, or franchise, beyond such reasonable necessary expense lawfully incurred as aforesaid.

"(e) The Commission shall keep itself informed of all new construction, extensions, improvements, retirements, or other changes in the condition, quantity, use, and classification of the property of common carriers, and of the cost of all additions and betterments thereto and of all changes in the investment therein, and may keep itself informed of current changes in costs and values of carrier properties.

"(f) For the purpose of enabling the Commission to make a valuation of any of the property of any such carrier, or to find the original cost of such property, or to find any other facts concerning the same which are re-

quired for use by the Commission, it shall be the duty of each such carrier to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and to cooperate with and aid the Commission in the work of making any such valuation or finding in such manner and to such extent as the Commission may require and direct, and all rules and regulations made by the Commission for the purpose of administering this section shall have the full force and effect of law. Unless otherwise ordered by the Commission, with the reasons therefor, the records and data of the Commission shall be open to the inspection and examination of the public. The Commission, in making any such valuation, shall be free to adopt any method of valuation which shall be lawful.

"(g) Notwithstanding any provision of this chapter the Interstate Commerce Commission, if requested to do so by the Commission, shall complete, at the earliest practicable date, such valuations of properties of carriers subject to this chapter as are now in progress, and shall thereafter transfer to the Commission the records relating thereto.

"(h) Nothing in this section shall impair or diminish the powers of any State commission. June 19, 1934, c. 652, Title II, § 213, 48 Stat. 1074."

47 U.S.C. § 214

"(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided,* That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further,* That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term 'line' means any

channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

"(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of the Army, the Secretary of the Navy, and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

"(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval

other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

"(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $100 for each day during which such refusal or neglect continues. June 19, 1934, c. 652, Title II, § 214, 48 Stat. 1075; Mar. 6, 1943, c. 10, §§ 2-5, 57 Stat. 11.

47 U.S.C. § 215

"(a) The Commission shall examine into transactions entered into by any common carrier which relate to the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier and/or which may affect the charges made or to be made and/or the services rendered or to be rendered by such carrier, in wire or radio communication subject to this chapter, and shall report to the Congress whether any such transactions have affected or are likely to affect adversely the ability of the carrier to render adequate service to the public, or may result in any undue or unreasonable increase in charges or in the maintenance of undue or unreasonable charges for such service; and in order to fully examine into such transactions the Commission shall have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, of persons furnishing such equipment, supplies, research, services, finances, credit, or personnel. The Commission shall include in its report its recommendations for necessary legislation in connection with such transactions, and shall report specifically whether in its opinion legislation should be enacted (1) authorizing the Commission to declare any such transactions void or to permit such transactions to be carried out subject to such modification of their terms and conditions as the Commission shall deem desirable in the public interest; and/or (2) subjecting such transactions to the approval of the Commission where the person furnishing or seeking to furnish the equipment, supplies, research, services, finances,

credit, or personnel is a person directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier; and/or (3) authorizing the Commission to require that all or any transactions of carriers involving the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier be upon competitive bids on such terms and conditions and subject to such regulations as it shall prescribe as necessary in the public interest.

"(b) The Commission shall investigate the methods by which and the extent to which wire telephone companies are furnishing wire telegraph service and wire telegraph companies are furnishing wire telephone service, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable.

"(c) The Commission shall examine all contracts of common carriers subject to this chapter which prevent the other party thereto from dealing with another common carrier subject to this chapter, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable. June 19, 1934, c. 652, Title II, § 215, 48 Stat. 1076."

47 U.S.C. § 218

"The Commission may inquire into the management of the business of all carriers subject to this chapter, and shall keep itself informed as to the manner and method in which the same is conducted and as to technical developments and improvements in wire and radio communi-

cation and radio transmission of energy to the end that the benefits of new inventions and developments may be made available to the people of the United States. The Commission may obtain from such carriers and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created. June 19, 1934, c. 652, Title II, § 218, 48 Stat. 1077."

47 U.S.C. § 313

"(a) All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as

the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court.

Refusal of licenses and permits

"(b) The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under this section. June 19, 1934, c. 652, Title III, § 313, 48 Stat. 1087; Sept. 13, 1960, Pub.L. 86-752, § 5(b), 74 Stat. 893."

CALIFORNIA STATUTES

The pertinent provisions of the California Public Utilities Code are:

§ 558

"Every telephone corporation and telegraph corporation operating in this State shall receive, transmit, and deliver, without discrimination or delay, the conversations and messages of every other such corporation with whose line a physical connection has been made."

§ 701

"The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto,

which are necessary and convenient in the exercise of such power and jurisdiction."

§ 766

"Whenever the commission, after a hearing finds that a physical connection can reasonably be made between the lines of two or more telephone corporations or two or more telegraph corporations whose lines can be made to form a continuous line of communication, by the construction and maintenance of suitable connections for the transfer of messages or conversations, and that public convenience and necessity will be served thereby, or finds that two or more telegraph or telephone corporations have failed to establish joint rates, tolls, or charges for service by or over their lines, and that joint rates, tolls, or charges ought to be established, the commission may, by its order, require that such connection be made on the payment of such compensation, if any, as it finds to be just and reasonable, except where the purpose of the connection is primarily to secure the transmission of local messages or conversations between points within the same city, or city and county. The commission may, by order, require that conversations be transmitted and messages transferred over such connection under such rules as it may establish, and may prescribe through lines and joint rates, tolls, and charges. If such telephone or telegraph corporations do not agree upon the division between them of the cost of such physical connection or connections or the division of such joint rates, tolls, or charges established by the commission over such through lines, the commission may after further hearing, establish such division by supplemental order."

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-595

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, and BELL TELEPHONE COMPANY OF NEVADA, *Petitioners*

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, *Respondent*

CITIZENS UTILITIES COMPANY and CITIZENS UTILITIES COMPANY OF CALIFORNIA, *Real Parties in Interest*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR REAL PARTIES IN INTEREST CITIZENS UTILITIES COMPANY AND CITIZENS UTILITIES COMPANY OF CALIFORNIA

QUESTIONS PRESENTED

Petitioners' presentation of their "Questions Presented" begins with a preamble full of legal and factual

false assumptions. Petitioners then pose three questions which attempt to ignore the procedural posture in which this case appears here. Real Parties in Interest suggest that the questions presented are more accurately stated as follows:

1. Did the United States Court of Appeals for the Ninth Circuit abuse its discretion in refusing to review, on mandamus, an order of the District Court denying a motion for summary judgment?

2. If so, was the District Court without jurisdiction to hear a case in which petitioners and others were charged with violations of §§ 1 and 2 of the Sherman Act by reason of State and Federal statutes providing for regulation of some aspects of the telephone industry by State and Federal regulatory bodies, respectively?

3. Did the United States Court of Appeals for the Ninth Circuit abuse its discretion in refusing to review, on mandamus, an order of the District Court refusing to stay proceedings in a private antitrust case pending referral to the Federal Communications Commission and to the California Public Utilities Commission, respectively, for advisory opinions of those bodies on portions of issues in this case no longer within the power of those bodies to decide?

4. If so, was the District Court absolutely required to stay proceedings in the private antitrust action before him pending referral of certain issues in the case to the Federal Communications Commission and of certain other issues in the case to the California Public Utilities Commission for advisory opinions of those bodies on portions

of issues in the case no longer within the power of those bodies to decide?

STATUTORY PROVISIONS INVOLVED

Petitioners have neglected to mention that this lawsuit was brought under §§ 1 and 2 of the Sherman Act and § 4 of the Clayton Act. These provisions are reprinted in the Appendix hereto.

Also involved in the case are Sections 206, 207 and 221 of the Communications Act of 1934. They also are reprinted in the Appendix.

STATEMENT OF THE CASE

Petitioner American Telephone and Telegraph Company will be referred to hereinafter as "AT&T", petitioner The Pacific Telephone and Telegraph Company as "PT&T", petitioner Bell Telephone Company of Nevada as "Nevada Bell" and respondents, collectively, as "Citizens". AT&T and the various corporations (including PT&T and Nevada Bell) which it controls through either 100% or majority stock ownership, are referred to hereinafter collectively as the "Bell System".

Since the petition is seeking, in effect, the summary judgment for petitioners which the District Court refused to grant, the facts must be taken in the light most favorable to Citizens.

References hereinafter to ("C.A. Appx. .....") are to pages of the Appendix filed by petitioners in the Ninth

Circuit in their unsuccessful quest for a writ of mandamus or prohibition in the Ninth Circuit.

Petitioners and the rest of the Bell System are charged in this case with monopoly and with horizontal conspiracy to fix the prices which they charge independent telephone companies for access to the rest of the telephone world through Bell System facilities, all in violation of §§ 1 and 2 of the Sherman Act. (C.A. Appx. 8) While roughly 20% of the telephones in America are owned by independent (i.e., non-Bell System) companies, the Bell System has a total, "bottleneck" monopoly on long-distance telephone transmission facilities. (C.A. Appx. 408, 886, 1043) This monopoly is a result, in part of ownership of America's "long lines" through AT&T's "Long Lines Division." In part, the Bell System monopoly results from Bell System dominance of telephone service in the most populous parts of America through its 23 operating companies, including PT&T and Nevada Bell.

The independents (including Citizens) are ranged around the periphery of the Bell System. In order to provide nationwide telephone service (as all do and must do) the independents must interconnect with their adjacent Bell System companies. The contracts by which such interconnection takes place are called "traffic agreements."

Traffic agreements between Bell System companies (including petitioners) and independents (including Citizens) generally are *not* regulated. They are negotiated. They are private contracts. They come in a variety of forms (although two general types are most common) and they require, like all contracts, the assent of both parties.

While traffic agreements are "filed" with the F.C.C. *in the carriers' own files* (see Petition, p. 6, f.n. 5) the "filing" has no legal effect—unlike the filing of tariffs, which does. (47 U.S.C. § 203(c))

Petitioners do not contend that they have ever submitted their settlement disputes with Citizens to either the F.C.C. or the California P.U.C. They affirmatively assert that Citizens never has presented the settlement dispute to any regulatory agency. (Ptrs' Br. p. 7) In fact, then, no regulatory agency has ever passed upon this long-standing dispute.

While the Bell System has offered independents (including Citizens) some choice in type of settlement arrangement, the choices have been Hobson's choices—all bad. This is a direct result of the Bell System "united front" on settlements, stage-managed from AT&T headquarters at 195 Broadway in New York. That is where Bell System policy on settlements is made. Petitioners conceded as much below. (C.A. Appx. 105)

In the absence of the conspiracy among Bell System companies, the independents in the telephone industry would have done much better in their negotiations with their Bell System companies. Arrangements agreed to by one Bell System company with its connecting independents would have become known in the industry, setting precedents for comparable demands by other independents elsewhere. The disparity in bargaining power between the larger independents and their single connecting Bell System companies is much less than the disparity between the larger independents and the Bell System as a whole, acting in concert.

In fact, as the years have passed and the independent segment of the telephone industry has become more concentrated (4,359 independents in 1953 as against 1,700 in 1971) settlement arrangements which the Bell System has been willing to offer the independents have significantly improved. (See C.A. Appx. 341, 882)

That the Bell System's conspiracy has damaged Citizens can hardly be doubted, but the amount of Citizens' damages was of course not reached below and is not an issue here.

A. How settlements between the Bell System and the Independents are actually arranged

Most of the discovery in this case has been directed to how the Bell System establishes the formulas and ground rules by which Bell System companies settle with the independent segment of the industry for interchanged traffic. This, it turns out, is all handled outside of any regulatory framework whatever. Rather, AT&T has orchestrated and controlled negotiations on behalf of the entire Bell System in developing standard forms of settlement arrangements for inclusion in traffic agreements between Bell companies and their connecting independent companies.

For the last several decades, negotiations have gone on in private between AT&T on the one hand and an association known as the United States Independent Telephone Association ("U.S.I.T.A.") on the other hand. While regulatory officials undoubtedly know that these negotiations occur from time to time, and are advised of their outcome through the trade press, or otherwise, the process by which the Bell System obtains its "standard"

settlement schedules is entirely a matter of private negotiation. The two types of settlements which the Bell System has offered to connecting companies are the so-called "cents-per-message" or "average cost" schedules and the so-called "actual cost study" settlement.

The "cents-per-message" schedules have generally been worked out between AT&T and U.S.I.T.A. without regulatory participation and jointly "sold" to the industry.

Actual cost settlements have been, generally, the product of individual negotiations between Bell System companies and their connecting independent companies on the basis of principles laid down by the Bell System.

1. Cents-Per-Message Schedules.

The main settlement approach which the Bell System companies have offered their independent connecting companies is a uniform settlement schedule keyed to the "average revenue per message" generated by the toll calls which the independent company interchanges with the connecting Bell System company. These schedules have purportedly been based upon the average costs incurred by an allegedly representative sample of independent companies in providing their portion of the service in handling interchanged traffic. These are the "cents-per-message" or "CPM" or "average cost" schedules.

However, the cents-per-message schedules have in fact been the result of "negotiations" between U.S.I.T.A. committees and AT&T. The results of these negotiations have been recommended to the independent industry by U.S.I.T.A. and to the Bell System operating companies by AT&T. (C.A. Appx. 849-856)

No Bell System company has ever, at any time here material, refused to follow AT&T's recommendation to offer a new cents-per-message schedule to its connecting independent companies as a basis of settlement. The vast majority of independent companies in the United States have always settled with their connecting Bell companies on the basis of the cents-per-message schedules. (C.A. Appx. 980, 945-946)

2. Actual Cost Settlement.

In an "actual cost study" type of settlement, the expenses of the independent company in providing services on traffic interchanged with the Bell System and the independent telephone company's investment related to that business are determined by an accounting allocation process known as a "separation."

Once the independent company's expenses and investments related to the interchanged business have been "separated," settlement is made between the independent company and the connecting Bell System company on a basis designed to return to the independent company its costs of providing the plant and services related to the interchanged traffic, together with a rate of return on the independent telephone company's investment related to the interchanged traffic.

In order to perform the separation of expenses and investment for a cost study settlement, separations procedures must be used. These procedures, sometimes embodied in a "manual," are a series of accounting and engineering assumptions and instructions. (C.A. Appx. 205, 706, 744) Choice of these assumptions obviously affects settlements.

Citizens expects to prove at trial that the Bell System companies combined and conspired to:

(a) Resist the use of actual costs studies as a basis for developing settlement between independent companies and Bell System companies;

(b) Take all necessary and appropriate steps to hamper the development of separations procedures and separations manuals which independents, and particularly smaller independents, could readily and easily employ in making actual cost studies;

(c) Maintain a united front with respect to particular elements of proposed separations procedures in order to maximize the returns of the Bell System and minimize the return to the independent telephone companies, including resistance to the adoption and application of the "Charleston Plan";

(d) Insist upon the inclusion of inadequate "rates of return" upon independent company investment related to interchanged traffic, and insist upon inclusion of rates of return not higher than the ostensible "toll" rates of return of the Bell System companies;

(e) Conceal the true rates of return obtained by the Bell System companies and by the connecting independent companies on the interchanged business.

3. The Bell System has Subverted the U.S.I.T.A. Negotiators.

The Bell System has not only succeeded in keeping settlements within the confines of private negotiations with U.S.I.T.A. but also managed to exert considerable control over U.S.I.T.A.'s negotiators by means of special, advantageous arrangements for the independent com-

panies from which the U.S.I.T.A. negotiators come. The evidence of Bell's subversion need not be detailed here. This is not a trial court. The evidence mentioned in warding off summary judgment is by no means all the evidence on the point. And in any event, petitioners conceded the fraud in connection with the ruling here (improperly) appealed from. (C.A. Appx. 105)

ARGUMENT

A. Petitioners are seeking review of a patently non-appealable order by petition for certiorari to review denial of a writ of mandamus.

Apparently realizing that there is no defense to this case on the merits, petitioners challenged the trial court's jurisdiction to hear the case by repeated motions for summary judgment. They were rebuffed. In a last ditch effort to prevent the case from coming to trial, petitioners sought a writ of mandamus or prohibition from the Court of Appeals for the Ninth Circuit to review the patently non-reviewable interlocutory orders denying their motions for summary judgment.

Not surprisingly, the Ninth Circuit denied the writs out of hand.

Nothing daunted, petitioners are now here seeking review of the Ninth Circuit's denial of mandamus and prohibition in attempting to carry their appeal from non-appealable orders one step higher.

There is no justification for this extraordinary deviation from settled principles governing federal appeals. The issues presented by this case can be and should be re-

viewed upon an appeal from the final judgment if the losing party is inclined to take an appeal at that time.

B. The "Record" in this case is not appropriate for review at this time.

The "Record" here consists of two opinions of the District Court, certain documents presented to the Ninth Circuit by petitioners as an appendix to their petition for a writ of mandamus or prohibition and the Ninth Circuit's denial of those writs without opinion. The appendix filed by petitioners in the Ninth Circuit consists of certain evidence mentioned by Citizens in opposition to motions for summary judgment in the District Court. While the District Court found that evidence sufficient to preclude summary judgment, it is but a small fraction of the total evidence in the case.

Now, however, petitioners are seeking what amounts to a final review of the case on its merits without first having permitted either the District Court or the Ninth Circuit to consider the case in the context of all of the evidence.

There can be no doubt about petitioners' desire to appeal the ruling of the District Court in this matter. They asked for, and did not obtain, the ruling of the District Court which is prerequisite to an immediate appeal under the provisions of 28 U.S.C. Sec. 1292(b). (Ptn. p. 8).

But the whole point of 28 U.S.C. § 1292(b) is that interlocutory appeals are permissible only with the certification of the trial court—which was denied here.

C. This case presents no unique or extraordinary questions requiring review by certiorari.

The Ninth Circuit rendered no opinion in this case; its denial of mandamus or prohibition has essentially no precedential value whatever.

Moreover, the Ninth Circuit's action in denying the mandamus petition without opinion, as such, was fully justified in the light of ample precedent on that subject. *Will v. United States,* 389 U.S. 90 (1967); *Roche v. Evaporated Milk Association,* 319 U.S. 21 (1942); *Japan Line Ltd. v. Sabre Shipping Corp.,* 407 F.2d 173 (2nd Cir. 1969).

As for the District Court's opinions, they were correct. Telecommunications is, at best, a partially regulated industry in which the partial regulation is shared between state or local authorities. The paralyzing effect of this form of divided regulation is readily demonstrated by the facts of this case, in which the crucial settlement arrangements between petitioners and Citizens have never been regulated, in fact, by either federal or state regulatory authorities.

The District Court had before it not only all of the cases cited in the petition, but also other decisions of this Court and of the Courts of Appeals for the various circuits.

We respectfully submit that this Court's opinion in *Otter Tail Power Company v. United States,* 410 U.S. 366 (1973) fully supports the decision of the District Court to permit this case to go to trial under the antitrust laws notwithstanding the possibility that regulatory agen-

cies might also have jurisdiction over some phases of the problem. In *Otter Tail,* of course, parallel regulatory proceedings were not only a possibility, but an actuality.

Even if the District Court erred (which it did not), such an error would hardly justify an immediate review, by this court, on a truncated record, without the benefit of intervening consideration of the Court of Appeals.

D. This is a classic antitrust case.

Petitioners suggest, in various ways, here and below, that the antitrust laws are inapplicable to a nationwide price fixing conspiracy of 23 separately incorporated corporations, controlled through varying degrees of stock ownership by AT&T.

First of all, there is no doubt that Bell System companies can violate the antitrust laws by conspiring among and between themselves and with their parent AT&T. *Perma-Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 141-142 (1968); *Timken Roller Bearing Co. v. United States,* 341 U.S. 593, 598 (1951); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211, 215 (1951).

Whether this conspiracy be thought of as a conspiracy between sellers or between buyers of long-distance telephone transmission services is basically immaterial; a price fixing conspiracy or monopoly on the buying side is as illegal as a monopoly or price fixing conspiracy on the selling side. *Chattanooga Foundry and Pipe Works v. City of Atlanta,* 203 U.S. 390 (1906); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 235 (1948).

Petitioners make the curious argument that the anti-trust laws cannot apply here because there is "no competition." If they mean that there is no competition between petitioners and Citizens, the argument is without merit; parties injured by a price fixing conspiracy are usually the customers or suppliers of the conspiracy, not its competitors. See *Chattanooga Foundry, Mandeville Island Farms, supra.*

If petitioners are arguing that there is no competition among and between themselves, they are, in essence, confessing the violation charged. True, the Bell System has a monopoly of long-distance transmission of message toll telephone service. It need not have. On other kinds of long-distance data transmission, the Bell System faces competition. See, e.g., *In the Matter of AT&T,* 23 FCC 2d 503.

Moreover, absent the conspiracy here alleged, there would have been a species of competition between the various operating companies of the Bell System to develop alternative methods of handling settlements on a consensual basis.

Petitioners certainly face no disability in paying treble damages if an award of treble damages is justified on the law. See e.g., *Carter v. AT&T,* 365 F.2d 486 (5th Cir. 1966), cited by petitioners. Indeed, the accounting system prescribed by F.C.C. regulations for telephone companies within its jurisdiction makes express provision for the possibility that a telephone company will be charged with a forfeiture or penalty and prescribes the accounting treatment of such payments. See 47 F.R.C. § 31.370; FCC Order 70-1278 of Dec. 9, 1970, 26 FCC 2d 889 (1970).

Conversely, a regulated utility faces no disability in collecting treble damages, and it is no answer for petitioners to suggest that any injury which Citizens may have suffered has been "passed on" to Citizens' rate-paying customers. That argument was rejected in every regulated electric utility case which considered the issue. See *Commonwealth Edison Company v. Allis-Chalmers Manufacturing Company,* 335 F.2d 203 (7th Cir. 1964); *Ohio Valley Electric Corporation v. General Electric Company,* 244 F. Supp. 914 (D.C. S.D. N.Y. 1965); *Public Utility District No. 1 v. General Electric Company,* 230 F. Supp. 744 (D.C.W.D. Wash. 1964); *Atlantic City Electric Company v. General Electric,* 226 F. Supp. 59 (D.C. S.D. N.Y. 1964); *cf. Philadelphia Electric Co. v. Westinghouse Electric Corp.,* 308 F.2d 856 (3rd Cir. 1962).

E. Settlements between telephone companies are not "pervasively regulated".

Petitioners have made a skilfull effort to blur the distinction between telephone *rate* regulation (which is intended to be reasonably pervasive) and the theoretical power of commissions to become involved in settlements (which is seldom, if ever, exercised). The distinction is important.

Petitioners have also neglected the important distinction between F.C.C. regulation of interstate telephone service and California P.U.C. regulation of intrastate service. While the California P.U.C. has, from time to time, carried rate cases through to their conclusion, the F.C.C. abandoned its only attempt at overall rate regulation of Bell System rates after "off-the-record"

negotiations with the parties. *In the Matter of AT&T*, 23 FCC 2d 503, 505 (1970). The F.C.C. has never involved itself in settlement at all.

1. The F.C.C. Does Not "Pervasively Regulate" the Telephone Business.

Much of petitioners' argument hinges upon their quotation of dictum from *United States v. R.C.A.* 358 U.S. 334, 348-350 (1959) to the effect that the telephone industry is "pervasively regulated." That dictum was entirely unnecessary to the decision of the case, which *held* that the antitrust laws are fully applicable to radio and television broadcasting. *R.C.A.* made particular reference to rates, as a subject of regulation, and of course that distinction is valid; there is no statutory basis for control over the advertising charges of a radio or television station, but there is at least theoretical power in the F.C.C. to regulate interstate telephone rates.

Of course, the practice of the F.C.C. has been to regulate by means of so-called "continuous surveillance," without ever actually regulating anything. In other words to avoid the remote possibility that the F.C.C. might someday exercise its statutory authority to establish telephone rates, AT&T files a tariff which it thinks will not provoke the F.C.C. to regulatory action, and the F.C.C. lets it sit there. The F.C.C. has, itself, made the point that this sort of regulation does *not* amount to "agency action!" See *In the Matter of AT&T Co.*, 20 FCC2d 886, 889 (1969).

This curious kind of "regulation" was possible because the mere "filing" of a tariff has legal consequences. Once filed in accordance with 47 U.S.C. § 203, a tariff on interstate calls must be followed (47 U.S.C. §203(c)), and

may not be changed ". . . except after thirty days' notice to the Commission and to the public. . . ." (47 U.S.C. § 203(b)).

In contradistinction to § 203 and numerous other sections dealing with ". . . charges, practices, classifications and regulations. . . ." as between telephone companies and the *public,* there is practically no mention of settlements *as between telephone companies* in the federal statutory scheme.

To be sure, telephone companies were, at one time, required to file under 47 U.S.C. § 211(a), copies of "all contracts, agreements or arrangements with other carriers . . ." as well as any other contracts of any kind which the F.C.C. wants filed under 47 U.S.C. § 211(b). However, the "filing" of such contracts, unlike tariff filings, had no legal consequences. It was informational; the contracts were there if the F.C.C. ever decided to look at them.

The F.C.C. officially recognized the totally meaningless character of the "filing" of traffic agreements when it modified its rules in 1970 so that telephone companies could meet the "filing" requirements for traffic agreements between domestic common carriers by *not* filing them with the F.C.C. but rather by keeping them on file in the records of the carriers themselves. See 47 CFR § 43.51(c), 35 FR 17412 (Nov. 13, 1970) and F.C.C. decision 70-1194, 26 FCC2d 512 (1970) explaining the change.

At most, the F.C.C. might have the power to referee the "divisions of charges" for interstate calls as between the Bell System and the independents under 47 U.S.C.

§ 201(a). That is the only part of the Federal Communications Act which deals with the "divisions" of charges as opposed to the charges themselves. Petitioners cite no case anywhere, anytime, in which the F.C.C. has purported to use that power.

2. The California Regulatory Scheme Cannot Immunize an Interstate Antitrust Conspiracy.

Petitioners find no more support for their "pervasive regulation" argument in the California regulatory scheme than they find in the federal system.

The State of California does have the power to control telephone rates on intrastate calls. It also apparently has the power to control divisions of revenues on at least some phases of intrastate traffic as between connecting telephone companies. The California P.U.C. has, in fact, on several occasions, ordered certain divisions between petitioner PT&T and independent telephone companies other than Citizens, usually over determined opposition of PT&T; as late as California Public Utilities Decision No. 74917 (1968), 69 Cal. P.U.C. 53, PT&T was still fighting the California P.U.C.'s jurisdiction to establish divisions of revenues under California Public Utilities Code § 766 "absent disagreement of the parties and hearing" (69 Cal. P.U.C. at 75).

3. Administrative Knowledge of Private Dealings Does Not Confer Antitrust Immunity.

It may be assumed that the F.C.C. and the California P.U.C. are aware that the Bell System is comprised of a number of separate corporations, and that they get together from time to time to decide how they are going

to handle the independent segment of the industry in negotiating new industry-wide settlement formulas.

It may also be assumed that the F.C.C. and the California P.U.C. know that, from time to time, Bell System representatices meet with representatives of the U.S.I.T.A. to negotiate those formulas.

However, all of the negotiations are private in the sense that regulatory officials do not participate in them. The most that can be said is that the regulatory bodies have apparently not taken action to halt the practice.

Of course, administrative knowledge of, or even acquiescence in, an unlawful agreement or practice does not immunize the activity from antitrust liability. *United States v. Socony-Vacuum Oil Co.* 310 U.S. 150, 225-227 (1923); *cf. American Column & Lumber Co. v. United States,* 257 U.S. 377, 411 (1921).

F. The District Court properly denied a stay.

Petitioners contend that Judge Harris abused his discretion by not staying the action until the plaintiffs presented their claims to the appropriate regulatory commissions.

This contention bears analysis.

First of all, it assumes that plaintiffs' claims under the antitrust laws are cognizable by some administrative body, which clearly they are not, since the District Courts have exclusive jurisdiction in private antitrust cases.

Secondly, petitioners' contention suggests that Citizens' antitrust claims be split up in some way between the

F.C.C. and the California P.U.C. for resolution, but does not suggest how.

Thirdly, petitioners' contention assumes that plaintiffs must have the burden of bringing proceedings in some agency. In fact, agency resolution of whatever might be resolved by some agency has been studiously avoided by petitioners during all the long years of this controversy. The burden, of course, is on them to obtain whatever immunity (if any) might be obtainable as a result of agency action. See *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 216-217 (1966).

G. The District Court did not abuse its discretion in refusing to refer this case to the F.C.C. and/or the California P.U.C. for decision.

The District Courts have considerable discretion to proceed with cases or to refer them to administrative agencies for consideration under the "primary jurisdiction" doctrine. *Carter v. AT&T,* 365 F.2d 486 (5th Cir. 1966), relied upon by petitioners, is not applicable here. In *Carter,* the reference could be made, and was made, solely to the F.C.C. for consideration of a tariff filed with the F.C.C. The "split" reference which petitioners apparently seek in the case at bar (conspiracy to fix intrastate settlements to be referred to the California P.U.C., same conspiracy to be referred to F.C.C. in its interstate aspects) was not involved in *Carter.*

Moreover, as the *Carter* court notes, the antitrust case depended upon the validity of a tariff. The court said, *inter alia,* "First, a tariff, required by law to be filed, is not a mere contract. It is the law." (365 F.2d at 496)

Here, of course, we are dealing with a "mere contract" which the parties are free to change from time to time, and which they are now required to "file" only with themselves. 47 C.F.R. § 43.51(e). By no stretch of the imagination is this kind of contract "the law."

Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973), relied upon by petitioners, deals with a rather unusual fact situation in an industry utterly unrelated to the transmission or carriage of anything (electricity, gas, passengers or telephone messages), but involving unique problems essentially internal to the management of a commodity exchange. In the face of the direct holding of *Otter Tail Power Company v. United States,* 410 U.S. 366 (1973), rejecting primary jurisdiction in the fact of actual regulation of a *utility, Ricci* would not appear to be controlling here.

The essence of the antitrust charge in *Ricci* was an alleged conspiracy to deprive Ricci of his seat on the Exchange *in violation of the rules and regulations of the Exchange.* The question was, had Ricci's seat in fact been transferred in violation of rules of the Exchange and of the Commodity Exchange Commission?

The Court found it necessary to determine, as a first step in *Ricci,* whether or not the rules of the Exchange had been violated *as alleged by the plaintiff.* Only after that had been determined would the antitrust issue become clear. Accordingly, the Court sent the case to the Commodity Exchange Commission for a determination of the validity of transfer of Ricci's exchange membership under the rules and regulations of the Exchange and of the Commission.

Here, by contrast, there is no "self-regulatory" body sanctioned by statute. Citizens charges no violation of rules or regulations of any administrative body or of any private self-regulatory body remotely authorized by statute or administrative rule. The "self-regulation" charged here is the unofficial, unsupervised, unregulated "regulation" imposed by a cartel dominated and controlled by defendant AT&T. This totally unauthorized and governmentally unregulated "private government" is the very definition of a contract, combination and conspiracy in violation of the Sherman Act.

The controlling case here is *Otter Tail Power Co. v. United States,* 410 U.S. 366, (1973). The salient facts of *Otter Tail* bear repeating. Like the petitioners here, Otter Tail was a "regulated" public utility engaged in providing a transmission service. Most but not all of the power transmitted by Otter Tail was generated by Otter Tail. (Here, most but not all of the telephone calls transmitted by the Bell System are generated within the Bell System.) Otter Tail occupied a "bottle neck" position with respect to municipal electrical systems which wished to transmit power through Otter Tail from the point at which power was generated to their own distribution systems in which the power could be used. (The Bell System controls most of the long distance lines in America, and an independent company is forced to interconnect with the Bell System in order to transmit its long-distance calls.)

Of course, in the *Otter Tail* case, the defendant's central "bottle neck" position was used to enhance Otter Tail's power at the retail level; Otter Tail refused to transmit power. In the case at bar, the Bell System has

not refused to interconnect with independents, but has instead used its central position and its considerable economic power to establish prices on interchanged traffic which are completely unfair and inadequate to plaintiffs. That is a distinction without a difference.

If there is a difference, it is that Otter Tail acted alone. In the case at bar, a conspiracy among a number of separately incorporated and separately owned corporations comprising the "Bell System" has operated in concert to achieve the unlawful result.

Finally, in *Otter Tail,* the F.P.C. not only had the power to regulate the matter in issue, but *actually exercised it concurrently with the District Court!*

While this Court vacated the judgment in *Otter Tail* on other grounds, it affirmed the District Court's assertion of its own jurisdiction and its judgment that Otter Tail had violated the antitrust laws. The *Otter Tail* majority rejected both the "immunity" or "exclusive jurisdiction" approach of *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363 (1973) and the "primary jurisdiction" approach of *Ricci.*

Even the dissenting Justices, who felt that Otter Tail's monopolistic practices were justified, or at least not subject to the District Court's jurisdiction in the first instance, noted that ". . . *If Otter Tail had combined with other retailers of electricity and undertaken mutual noncompetition agreements, this would be a different case.*" (Dissent, footnote 5; emphasis added).

In the case at bar the existence of the horizontal conspiracy among 23 Bell companies is not seriously disputed. (C.A. Appx. 105). Thus, even the dissenting

Justices in *Otter Tail* would seem to concur in the assertion of the District Court's jurisdiction in this case.

H. Hughes Tool Co. v. Trans World Airlines, Inc. has no application here.

Petitioners urge dismissal of this case on the authority of *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973). The suggestion has no merit.

Hughes Tool dealt with a series of activities of Hughes Tool Co. constituting control over Trans World Airlines. Those were activities which, if approved by the C.A.B. were by statute, *immunized* from antitrust attack. This Court found that indeed each of the challenged actions of Hughes Tool had been expressly approved, and thereby immunized by C.A.B. order.

In the case at bar, no similar contention can be made. There is no statute suggesting that arrangements otherwise violative of the antitrust laws, but passed by the California P.U.C. would be immunized for any purpose, and yet petitioners argue that the California P.U.C. is one of the agencies with exclusive jurisdiction of the matters here in issue. As for the F.C.C. express antitrust immunity is provided for certain mergers which are consummated with F.C.C. approval under 47 U.S.C. § 221(a). Otherwise, there is no provision in the Federal Communications Act which provides any immunity for acts otherwise in violation of the antitrust laws. Indeed, it is clear that any remedies available under the Federal Communications Act are *not* exclusive. (See Sections 206 and 207 of the Act, 47 U.S.C. §§ 206, 207)

Since the activities being challenged are not expressly exempt from the antitrust laws, any repeal must be by

implication. But "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963); see also *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 217-8; *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963); *California v. Federal Power Commission*, 369 U.S. 482, 485 (1962); *Georgia v. Pennsylvania Railroad Co.*, 324 *U.S.* 439, 456-7 (1945). No such repugnancy exists here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH L. ALIOTO,

LAWRENCE ALIOTO,

By JOSEPH L. ALIOTO,

Attorneys for

Real Parties in Interest.

MATTHEW P. MITCHELL,

Of Counsel.

(Appendix Follows)

Appendix

STATUTORY PROVISIONS

Section 1 of the Sherman Act, 26 Stat. 209, § 1 (1890) as amended 50 Stat. 693 (1937), 69 Stat. 282 (1955), 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Section 2 of the Sherman Act, 26 Stat. 209, § 2 (1890), as amended 69 Stat. 282 (1955), 15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 38 Stat. 731, § 4 (1914), 15 U.S.C. § 15:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 206 of the Communications Act, 48 Stat. 1072, § 206 (1934), 47 U.S.C. § 206:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sutstained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 207 of the Communications Act, 48 Stat. 1073, § 207 (1934); 47 U.S.C. § 207:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

Section 221 of the Communications Act, 48 Stat. 1080, § 221 (1934) as amended 68 Stat. 64, § 4 (1954) and 70 Stat. 932, § 3 (1956); 47 U.S.C. § 221:

> (a) Upon application of one or more telephone companies for authority to consolidate their properties or a part thereof into a single company, or for authority for one or more such companies to acquire the whole or any part of the property of another tele-

phone company or other telephone companies or the control thereof by the purchase of securities or by lease or in any other like manner, when such consolidated company would be subject to this chapter, the Commission shall give reasonable notice in writing to the governor of each of the States in which the physical property affected, or any part thereof, is situated, and to the State commission having jurisdiction over telephone companies, and to such other persons as it may deem advisable, and shall afford such parties a reasonable opportunity to submit comments on the proposal. A public hearing shall be held in all cases where a request therefor is made by a telephone company, an association of telephone companies, a State commission, or local governmental authority. If the Commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction unlawful shall not apply. Nothing in this subsection shall be construed as in anywise limiting or restricting the powers of the several States to control and regulate telephone companies.

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communications, in any case where such matters are subject to regulation by a State commission or by local government authority.

(c) For the purpose of administering this chapter as to carriers engaged in wire telephone commmunication, the Commission may classify the property of any such carrier used for wire telephone communication, and determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service. Such classification shall be made after hearing, upon notice to the carrier, the State commission (or the Governor, if the State has no State commission) of any State in which the property of said carrier is located, and such other persons as the Commission may prescribe.

(d) In making a valuation of the property of any wire telephone carrier the Commission, after making the classification authorized in this section, may in its discretion value only that part of the property of such carrier determined to be used in interstate or foreign telephone toll service.

SUPREME COURT, U. S.
FILED
NOV 12 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-595

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, AND BELL TELEPHONE COMPANY OF NEVADA, *Petitioners*

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, *Respondent*

CITIZENS UTILITIES COMPANY AND CITIZENS UTILITIES COMPANY OF CALIFORNIA, *Real Parties in Interest*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

FRANCIS R. KIRKHAM
JAMES MICHAEL
NOBLE K. GREGORY
ROBERT M. WESTBERG
MICHAEL H. SALINSKY
225 Bush Street, 19th Floor
San Francisco, California 94104
Attorneys for Petitioners

F. MARK GARLINGHOUSE
195 Broadway
New York, New York 10007

JAMES A. DE BOIS
140 New Montgomery Street
San Francisco, California 94105

PILLSBURY, MADISON & SUTRO
225 Bush Street, 19th Floor
San Francisco, California 94104
Of Counsel

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

The Brief in Opposition filed by real parties in interest demonstrates why the decisions below should not be allowed to stand. Their statement of the case (Brief in Opposition, pp. 3-10), even though one-sided and incom-

plete,[1] shows that they seek to try, as an antitrust case, a dispute raising complicated rate making concepts applicable to the reasonableness of the terms and conditions of interconnection between regulated telephone utilities. Such a trial requires, at the very least, prior reference to the regulatory agencies vested with jurisdiction and the required rate making experience and expertise.

The very assertion in this case that the Bell System constitutes a monopoly and a horizontal conspiracy with respect to the telephone calls carried on its facilities only illustrates what Congress anticipated when it established a regulatory commission with jurisdiction to determine, after opportunity for hearing, the just and reasonable division of charges between interconnecting carriers. As this Court pointed out in *F. C. C. v. RCA Communications, Inc.* (1953) 346 U.S. 86, 91-92, 93, and reiterated in *United States v. R. C. A.* (1959) 358 U.S. 334, 348-350, Congress has recognized the inefficacy of competitive market forces to regulate the common carrier service of the interstate telephone industry. Competition plays no part in determining the proper division of revenues between adjoining carriers whose communications facilities must interconnect. Congress has vested the Federal Communications Commission with the means and the complete authority to determine the correctness of the claims of real parties in interest. And that jurisdiction is exclu-

[1]Typical is their statement that petitioners conceded fraud (Brief in Opposition, p. 10) without pointing out that this was only an arguendo contention that the Federal Communications Commission had exclusive, or at least primary, jurisdiction *even if* it be assumed that the settlement agreements were reached by fraud or anticompetitive conspiracy.

sive of, or at least primary to, any jurisdiction in the district court.

I. INTERSTATE TELEPHONE COMMUNICATION IS PERVASIVELY REGULATED BY THE FEDERAL COMMUNICATIONS COMMISSION WHICH HAS JURISDICTION OVER THE INSTANT DISPUTE EXCLUSIVE OF, OR AT LEAST PRIMARY TO, THE JURISDICTION OF THE DISTRICT COURT.

Nowhere do real parties in interest deny that telephone communications are pervasively regulated by statute. To do so would be to deny reality (47 U.S.C. §§ 151, et seq.; *United States v. R. C. A.* (1959) 358 U.S. 334, 348-350; *Carter v. American Telephone & Telegraph Company* (5 Cir. 1966) 365 F.2d 486, 494, certiorari denied (1967) 385 U.S. 1008; see also Petition for Certiorari, pp. 9-13). Moreover, real parties in interest concede, as they must, that the Federal Communications Commission has jurisdiction over the very dispute involved in the case at bar —the division of revenues from interchanged telephone calls (Brief in Opposition, pp. 17-18; 47 U.S.C. §§ 201, 204, 205).

The claims that "[s]ettlements between telephone companies are not 'pervasively regulated'" (Brief in Opposition, p. 15), and that the "F.C.C. does not 'pervasively regulate' the telephone business" (Brief in Opposition, p. 16) are based on the misleading assertion of real parties in interest that the Federal Communications Commission has not been called upon to settle disputes between connecting carriers (cf. *Tri-City Telephone Company* (1969) 20 F.C.C.2d 674). In any event, they totally disregard the fact that they have never requested the Com-

mission to exercise that jurisdiction. They also disregard the established rule that prior action by an administrative agency is irrelevant to the issue of exclusive or primary jurisdiction: what is crucial is the statutory power to regulate when the issue is brought to the Commission's attention.

Texas & Pac. Ry. v. Abilene Cotton Oil Co. (1907) 204 U.S. 426, 440;

Balt. & Ohio R. R. v. Pitcairn Coal Co. (1910) 215 U.S. 481, 493-494, 498;

Mitchell Coal Co. v. Penna. R. R. Co. (1913) 230 U.S. 247, 257, 266-267;

Carnation Co. v. Pacific Conference (1966) 383 U.S. 213, 220-221;

U. S. Nav. Co. v. Cunard S. S. Co. (1932) 284 U.S. 474, 486-487.

And real parties in interest's assertion that petitioners have the burden of bringing the dispute to the Commission (Brief in Opposition, p. 20) is not supported by *Carnation Co. v. Pacific Conference* (1966) 383 U.S. 213, or by any of the foregoing cases.

The reasonableness of the division of revenues between regulated telephone companies, whose facilities must interconnect, presents a case in which Congress plainly intended to substitute pervasive regulation for competition (Petition for Certiorari, pp. 19-20). Not one of the cases cited by real parties in interest refutes this. In *U. S. v. Philadelphia Nat. Bank* (1963) 374 U.S. 321 (Brief in Opposition, p. 25), the Court found that bank regulation was not pervasive (374 U.S. 351-354) and specifically pointed out that "bank regulation is in most re-

spects less complete than public utility regulation" (374 U.S. 352). Likewise, in *Silver v. New York Stock Exchange* (1963) 373 U.S. 341, 357-359; *California v. Fed. Power Comm'n* (1962) 369 U.S. 482, 485-486; and *Georgia v. Pennsylvania R. Co.* (1945) 324 U.S. 439, 456 (Brief in Opposition, p. 25), unlike the case at bar, there was no pervasive regulation and the agencies did not have regulatory authority over the issues in question. In *Carnation Co. v. Pacific Conference* (1966) 383 U.S. 213 (Brief in Opposition, p. 25), a stay was ordered because of the agency's regulatory authority.

Nor is *Otter Tail Power Co. v. United States* (1973) 410 U.S. 366 (Brief in Opposition, pp. 22-23) in any way inconsistent with exclusive or primary jurisdiction of the Federal Communications Commission in the case at bar (see, generally, Petition for Certiorari, pp. 18-20). The Court in *Otter Tail* found specifically "that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power" (410 U.S. 374). Moreover, the Court affirmed the decree of the lower court which provided that the wholesaling would be done under " 'terms and conditions which are filed with and subject to approval by the Federal Power Commission' " (410 U.S. 375).

II. THE IRRELEVANT ARGUMENTS IN THE BRIEF IN OPPOSITION DO NOT REFUTE THE NECESSITY OF REVIEW BY THIS COURT.

The opposition to the petition argues matters irrelevant to the issue. It finds a distinction, for example, between a tariff and a contract (Brief in Opposition, pp. 20-21),

but completely ignores the basic fact that plenary power is in the Federal Communications Commission to establish the terms and conditions of both tariffs and contracts. Both parties to the interconnection agreements are fully regulated communications carriers. Therefore, it is not the manner of filing the disputed document which confers jurisdiction but the substance of the dispute, i.e., the division of revenues from interchanged telephone calls. The Federal Communications Commission is given regulatory authority over such divisions (47 U.S.C. §§ 201, 204, 205) and whether the divisions which are the subject of the dispute were originally in the form of a contract or tariff is irrelevant.

Likewise irrelevant is the statement regarding the "splitting" of the claims between the Federal Communications Commission and the California Public Utilities Commission (Brief in Opposition, pp. 19-20). The issue in this case is whether those Commissions have exclusive or primary jurisdiction. There is simply no question that the dispute is within the jurisdiction of the Federal Communications Commission. That agency is the primary concern of the Federal courts.

The assertion that the record in the instant case is inappropriate for review (Brief in Opposition, p. 11) is also irrelevant. Administrative jurisdiction is a matter of statutory construction. Accumulation by the court of detailed evidence prior to the determination of proper jurisdiction would be a gross waste of judicial time. Nor is there any basis for the implication that petitioners are seeking a final review of the case on the merits without real parties in interest having their evidence con-

sidered (Brief in Opposition, p. 11). It is to regulatory agencies that real parties in interest should present their evidence.

III. THE EXTRAORDINARY NATURE OF THE DECISIONS BELOW AND THE INEXCUSABLE WASTE OF JUDICIAL TIME THAT THEY WILL INCUR WARRANT REVIEW BY THIS COURT.

The assertion that this case presents no extraordinary question requiring review by this Court (Brief in Opposition, p. 12) is unsupported by any authority. *Will v. United States* (1967) 389 U.S. 90, 95, relied on *Roche v. Evaporated Milk Assn.* (1943) 319 U.S. 21, 26, in pointing out that the writ of mandamus is available to confine an inferior court to the lawful exercise of its prescribed jurisdiction. The court noted that:

> "While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power,' will justify the invocation of this extraordinary remedy" (389 U.S. 95).

In *Japan Line, Ltd. v. Sabre Shipping Corporation* (2 Cir. 1969) 407 F.2d 173 (Brief in Opposition, p. 12) the court of appeals clearly understood that mandamus was a proper remedy when the district court refused to defer to the jurisdiction of an administrative agency.[2] In that

[2]The court in that case also held "that 28 U.S.C., Section 1292(b) does not supplant the All Writs Act. * * * the mere denial by a District Judge of an application for certification under 28 U.S.C., Section 1292(b) does not preclude our consideration of a petition for any of the traditional writs" (407 F.2d 175).

case, the writ was denied because the plaintiff had gone to the administrative agency and that agency had refused to exercise its jurisdiction (407 F.2d 175).

In the case at bar, we submit, there has clearly been an unlawful failure to recognize the jurisdiction of the Federal Communications Commission. We further submit that in the circumstances of this case, the appropriate administration of justice requires the exercise of this Court's corrective powers at this time (see Petition for Certiorari, pp. 25-27).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS R. KIRKHAM
JAMES MICHAEL
NOBLE K. GREGORY
ROBERT M. WESTBERG
MICHAEL H. SALINSKY
Attorneys for Petitioners

F. MARK GARLINGHOUSE
JAMES A. DE BOIS
PILLSBURY, MADISON & SUTRO
Of Counsel